

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

This matter is before the court on Plaintiffs' Motion to Compel the Continuation of Deposition of Todd Leany (Dkt. #358). The court has considered the Motion, the Response (Dkt. #362), and the Reply (Dkt. #365), as well as Defendants' Alternative Countermotion to Stay Deposition of Todd Leany Pending Resolution of Defendants' Objection to Magistrate Judge's Order (Dkt. #363), and the Response to the Countermotion (Dkt. #367). No reply was filed, and the time for filing one has now run.

BACKGROUND

Early in this lawsuit, Plaintiffs produced a hard drive containing 200,000 e-mail files and over two million documents, including some recreated from Plaintiffs' computer servers in files maintained by Defendant Todd Leany and others. Plaintiffs noticed the deposition of Defendant Leany for May 24 and 25, 2010. On May 20, 2010, Defendants filed an Emergency Motion for Protective Order (Dkt. #82), asserting that many documents Plaintiffs produced were privileged, and Plaintiffs should be precluded from using them in Defendant Leany's deposition and should return them to Defendants. Plaintiffs opposed the motion, asserting the documents were not privileged. Plaintiffs' counsel agreed not to use the disputed documents in Defendant Leany's deposition but wanted to reopen Defendant Leany's deposition if the court denied Defendant's motion. *See Response* (Dkt. #84).

1 On May 21, 2010, the court entered a Temporary Protective Order (Dkt. #85) precluding the use
2 of the documents during Defendant Leany's deposition. On May 25, 2010, the court conducted a
3 telephonic status conference and determined the parties had not fully met and conferred concerning
4 their disputes about the potentially-privileged documents. The court denied Defendants' motion
5 without prejudice, directing the parties to discuss the matter further. *See Order*, Dkt. #88. Additionally,
6 the court allowed the parties until June 24, 2010, in which to file a status report identifying any
7 remaining disputes. *Id.* Plaintiffs took Defendant Leany's deposition, avoiding discussion of the
8 documents asserted to be privileged, and reserving the right to reconvene the deposition. On July 19,
9 2010, Defendants filed a Renewed Motion for Protective Order and Return of Privileged Documents
10 (Dkt. #101). The parties briefed the motion, and in an Order (Dkt. #336) entered September 30, 2011,
11 the court denied the Renewed Motion for Protective Order. Defendants filed an Objection (Dkt. #341),
12 which has been fully briefed and is under submission to the District Judge.

13 **I. Motion to Compel Continuation of Leany Deposition (Dkt. #358).**

14 Plaintiffs did not depose Defendant Leany about the documents Defendants asserted were
15 privileged. Plaintiffs acknowledge the discovery cut-off in this case ran on October 4, 2010, but assert
16 they could not have sought the requested relief until now. Plaintiffs seek to re-open discovery for the
17 limited purpose of finishing the deposition of Defendant Leany by asking questions related to the
18 documents Defendants asserted were privileged now that the court has found any privilege was waived.
19 Plaintiffs assert that given the procedural posture of this case, good cause exists to grant their motion.

20 Defendants respond that discovery closed on October 4, 2010, and dispositive motions were
21 filed and fully briefed in the spring of 2011. Plaintiffs waited two months after the court's ruling on the
22 privilege issue before asking the court to reopen discovery to conclude Defendant Leany's deposition.
23 Additionally, Plaintiffs have not demonstrated good cause for reopening discovery under LR 6-1, LR
24 26-4, and Federal Rule of Civil Procedure 30(a)(2)(A)(ii). They have not demonstrated why they need
25 to question Defendant Leany about a small number of documents or stated why the court should require
26 the parties to incur the additional costs of a deposition. The simple fact that Plaintiffs could not use the
27 documents in the first deposition does not provide sufficient good cause to reopen the deposition.

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1 Plaintiffs have not established how this testimony is not cumulative , and they will have the opportunity
2 to question Defendant Leany about the documents at trial.

3 In reply, Plaintiffs assert they refrained from asking any questions about the documents during
4 Defendant Leany's deposition, and they reserved 2.5 hours to ask those questions.

5 **II. Alternative Countermotion to Stay Continued Deposition (Dkt. #363).**

6 Defendants request that, to the extent the court is inclined to grant Plaintiffs' motion to continue
7 Defendant Leany's deposition, it should stay the deposition until after the District Judge rules on the
8 Defendants' Objection (Dkt. #341) to the undersigned's Order (Dkt. #336). Because a reversal of the
9 undersigned's order will moot Plaintiffs' request, the court should stay the continued deposition if it is
10 inclined to allow it to occur. In response, Plaintiffs incorporate the arguments advanced in their Motion
11 to Compel (Dkt. #358) and Reply (Dkt. #365).

12 The court finds that Plaintiffs have complied with LR 6-1 and 24-6 in seeking to reopen the
13 deposition of Defendant Leany. At the time he was originally deposed, Plaintiffs were precluded from
14 questioning Defendant Leany about the documents Defendants asserted were privileged. It is
15 undisputed that counsel for Plaintiffs indicated he would seek to re-depose or conclude Defendant
16 Leany's deposition if the court found the documents were not privileged in May 2010 when Defendant
17 Leany was deposed. Plaintiffs are entitled to depose Defendant Leany regarding these documents prior
18 to trial. However, because Defendants have filed an Objection to the undersigned's Order, and because
19 a number of dispositive motions are under submission, the court will stay Defendant Leany's deposition
20 until after the District Judge has decided the Objection and the dispositive motions.

21 Accordingly,

22 **IT IS ORDERED:**

- 23 1. Plaintiffs' Motion to Compel Continuation of Deposition of Todd Leany is GRANTED
24 if the District Judge sustains the undersigned's Order (Dkt. #336) and DENIED AS
25 MOOT if the District Judge overrules the undersigned's Order (Dkt. #336).
26 2. If the Objection (Dkt. #341) is sustained, counsel for the parties shall meet and confer to
27 schedule the continued deposition of Defendant Leany within thirty days the District
28 Judge's decision of the parties' pending motions for summary judgment.

- 1 3. The continued deposition shall be limited to the subject matter of documents withheld as
2 privileged and shall not exceed two hours, exclusive of the comments, arguments, and
3 objections of counsel, if any.
4 4. Defendants' Alternative Countermotion to Stay (Dkt. #367) is GRANTED. Plaintiffs
5 may depose Defendant Leany if the District Judge sustains the undersigned's Order. The
6 continued deposition shall occur within thirty days after the District Judge decides the
7 parties' motions for summary judgment.

8 Dated this 13th day of February, 2012.

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11 PEGGY A. TEER
12 UNITED STATES MAGISTRATE JUDGE
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